STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 26, 2006
v	No. 263013 Macomb Circuit Court
EUGENE DAVIDSON III, Defendant-Appellant.	LC No. 03-002986-FH

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v). Defendant was sentenced to concurrent terms of one-and-one-half to four years' imprisonment. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress $167,200 found in a dresser drawer in his bedroom as well as heroin and 24 lotto ticket strips found in his automobile. We disagree. "We review a trial court's findings of fact for clear error, [but] we review de novo the trial court's ultimate decision on a motion to suppress." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001).

"The Fourth Amendment of the United States Constitution and [Const 1963, art 1, § 11] guarantee the right of the people to be free from unreasonable searches and seizures." *People v Champion*, 452 Mich 92, 97; 549 NW2d 849 (1996). Generally, a warrantless search is unreasonable per se unless the prosecution satisfies its burden of showing that an exception to the warrant requirement applies. *Id*. at 98. Exigent circumstances, consent and plain view are recognized exceptions to the warrant requirement. *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005). Consent must be unequivocal, specific, and freely and intelligently given, and whether it is depends on the totality of the circumstances. *Frohriep, supra* at 702. A third party may grant consent to a search when the police have an objective basis for reasonably believing that the third party possesses common authority over the premises. See *People v Goforth*, 222 Mich App 306, 311-112; 564 NW2d 526 (1997).

Here, the record from the evidentiary hearing reveals that the prosecutor presented clear and positive testimony that defendant's wife, Kathy Davidson, consented to the search of the house. Officer Patrick Connor testified that after receiving a call where a woman was heard

"screaming in the background," he responded to defendant's residence. When he arrived, Kathy told him that defendant had a gun and that he had threatened to kill her. Although Kathy denied telling Connor that defendant had a gun, the trial court found Connor's testimony to be the more credible. Where there is conflicting testimony, a trial judge's resolution regarding a factual issue or a witness's credibility is entitled to deference. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Connor told Kathy that he "needed to go inside [the house] and look for the weapon that she was describing." Kathy responded that "she didn't have a problem, to go ahead and do what [Connor] had to do." The record does not reveal that any threats or coercion before Kathy's consent to search the house. Connor's testimony showed that Kathy's consent to search the house was "unequivocal, specific, and freely and intelligently given." *Frohriep, supra* at 702. Further, Connor had an objective basis for reasonably believing that the Kathy was a domestic violence victim who possessed common authority over the premises. *Goforth, supra* at 311-112.

Although defendant argues that Kathy merely acquiesced to Connor's request and that she did not know she had a right to refuse the search when confronted by a police officer, there was no evidence that Kathy's response was made under duress or that Connor coerced her response based on his implicit authority. The presence of a police officer does not necessarily indicate that a situation is coercive per se. See *People v Reed*, 393 Mich 342, 366; 224 NW2d 867 (1975). Moreover, knowledge of the right to refuse consent is only one factor to be considered in determining the validity and reasonableness of a consent to search. *Id*. at 362-363; *Schneckloth v Bustamonte*, 412 US 218, 227; 93 S Ct 2041; 36 L Ed 2d 854 (1973). Therefore, we conclude that the trial court did not clearly err when it found that Connor reasonably believed that he had obtained Kathy's consent to search defendant's house.

Moreover, the trial court properly concluded that the scope of the search was reasonable. "The scope of a consent search is limited by the object of that search." *Wilkens, supra* at 733. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness - - what would the typical reasonable person have understood by the exchange between the officer and the suspect." *Florida v Jimeno*, 500 US 248, 251; 111 S Ct 1801; 114 L Ed 2d 297 (1991).

Here, a "typical reasonable person" would have understood the exchange between Kathy and Connor to mean that Connor could go inside and search the entire house to look for the gun. Accordingly, based on Kathy's initial consent to Connor, the search of the entire house was objectively reasonable, and Connor was justified in looking for the gun in the open drawer. Thus, the trial court did not clearly err in concluding that the search of the house including the open drawer was reasonable.

Defendant next argues that the trial court erred in denying his motion to suppress because the police officers did not have probable cause to seize the $167,200 found in the dresser drawer. Defendant contends that the currency was not contraband or evidence of a crime. We disagree.

The police may seize property without a warrant when they are lawfully in a position to observe the property in "plain view," *and* the police have probable cause to believe the property is contraband or evidence of a crime. *Arizona v Hicks*, 480 US 321, 326; 107 S Ct 1149; 94 L Ed 2d 347 (1987). "The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the

item's incriminating character is immediately apparent." *Champion, supra* at 101. Our Supreme Court described probable cause in *People v Custer*, 465 Mich 319, 332; 630 NW2d 870 (2001):

> [P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband; it does not demand any showing that such a belief be correct or more likely true than false. Once an officer has probable cause to believe that an object is contraband, he may lawfully seize the object. [Citations and internal punctuation omitted.]

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984).

Here, the cash was not seized during the initial consensual search for a gun. Instead, the $167,200 was seized after defendant's arrest for felonious assault. Further, the record from the suppression hearing reveals that the police did not seize the currency until after developing probable cause to believe it was contraband. Specifically, in the course of investigating the original complaint, the police learned that the argument between the defendant and his wife was precipitated because defendant suspected his sons were stealing money from him. To protect themselves against claims of missing money and because it was the apparent source of domestic violence, the police advised defendant of their intent to "take the money with [defendant] for safekeeping." Defendant responded by requesting that the police place the money inside a safe they could locate in a Toyota parked in the driveway. The police acceded to defendant's request by obtaining the safe and counting the currency in defendant's presence before placing it into the safe. At this point, the police had not yet seized the currency because they had not meaningfully interfered with defendant's possessory interests in the cash. *Jacobsen, supra* at 113; see, also *Hicks, supra* at 324. Before locking the safe, the police asked and defendant stated he did not have the combination to the lock but that it was located in the Toyota. While looking for the safe's combination, the police found suspected heroin and lotto ticket strips. Accordingly, the police developed probable cause at that point to seize the currency.

Next, defendant argues that the trial court erred in concluding that he consented to the search of the Toyota, and, thus, no evidence should be allowed that the police found the packet containing the heroin (the "bindle") and the 24 lottery ticket strips. We conclude the evidence was properly recovered based on the consent and plain view exceptions to the warrant requirement.

The police were following defendant's request to lock the currency in a safe when defendant told the police the safe combination was located in a manila envelope in the front passenger seat of the Toyota near the center console. We conclude the trial court did not clearly err in finding that defendant consented to the police's retrieving the envelope containing the safe's combination. The evidence shows that defendant consented without duress or coercion to a search of the Toyota. The mere fact defendant was in custody at the time does not render his consent involuntary. *Reed, supra* at 363-366. Because the evidence was in plain view and its incriminating nature immediately apparent to Connor based on his training and experience, we conclude that Connor had probable cause to seize the items under the plain view exception to the warrant requirement. *Champion, supra* at 101, 110-112.

Defendant next argues that the prosecutor presented insufficient evidence to prove the elements of felonious assault beyond a reasonable doubt. Specifically, defendant argues that the prosecutor failed to show that defendant used a knife during the assault. We disagree.

Sufficiency of the evidence claims are reviewed de novo on appeal. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We must view the evidence in a light most favorable to the prosecution and determine whether a reasonable juror could have found all of the elements of the offense were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of the crime. *Id*. at 400.

"The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). An assault occurs when there is either an attempt to commit a battery or an unlawful act that places another in reasonable fear of receiving an imminent battery. *Id.* at 506 n 2.

Here, the evidence revealed that after entering the home and searching his bedroom for the cash, defendant confronted Kathy in the family room. Defendant was "very close" to Kathy, "right up in her face." Defendant's actions made her feel "threatened." Kathy testified that she felt that she needed to call "911" following her confrontation with defendant. While the police interviewed defendant regarding Kathy's allegations that he used a gun during the confrontation, he repeatedly told the officers that "he didn't own a gun, that he used – there was a knife involved in the assault, not a gun." Defendant described the knife as a "kitchen type" knife. A subsequent search of the house revealed that there were at least five "kitchen type" knives lying on the kitchen counter. Based on this evidence and the reasonable inferences that could be drawn therefrom, a reasonable jury could conclude that defendant intended to place Kathy in fear of a battery and that Kathy could have reasonably feared an imminent battery while defendant possessed a knife. Thus, the prosecutor presented sufficient evidence to prove the elements of felonious assault beyond a reasonable doubt.

Defendant contends that his statement that he "used a knife" in the "assault" is insufficient to prove the elements of felonious assault in light of Kathy's testimony at trial denying that she saw defendant with a knife. Because defendant's statements to the police constituted an admission of a party opponent, it was properly admissible under MRE 801(d)(2). *People v Kowalak (On Remand)*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). Where one of the exceptions in the rules of evidence applies, hearsay is admissible as substantive evidence. *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993). Further, it was for the jury to decide whether to credit defendant's subsequent testimony at trial explaining that he told the police that he used a knife only because he did not want the police officers to search the house for a gun and find the currency located in the bedroom. Likewise, it was for the jury to decide whether to credit Kathy's trial testimony that she did not see defendant with a knife. "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *Avant, supra* at 506. Thus, we conclude that defendant's argument is without merit.

Defendant next argues that proof of the corpus delicti of the charged offense is required before the prosecutor may introduce or rely on his inculpatory statements. Because this issue was not included in the statement of questions presented section of defendant's brief on appeal as

required by MCR 7.212(C)(5), it is not preserved for appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Regardless, the corpus delicti rule does not apply to the instant case because defendant's statements were merely an admission of fact that needs proof of other facts to show guilt. *People v Porter*, 269 Mich 284, 290; 257 NW 705 (1934).

Defendant next argues that the trial court abused its discretion in admitting defendant's five prior drug convictions pursuant to MRE 404(b). We disagree.

Under MRE 404(b)(1), "evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence may, however, be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." *Id.* To be admitted under MRE 404(b)(1), other acts evidence: (1) must be offered to prove something other than a character or propensity theory; (2) must be relevant under MRE 402, as enforced through MRE 104(b); and (3) the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In addition, the trial court may upon request provide a limiting instruction. *Id.* The prosecution bears the initial burden of establishing the evidence comes within the parameters of MRE 404(b). *Knox, supra* at 509, citing *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).

We conclude that the trial court did not abuse its discretion in admitting the other acts evidence. First, the prosecutor did not offer the evidence for the improper purpose of showing propensity to commit the instant drug offense. Rather, the prosecutor offered the evidence for the proper purpose of showing defendant's knowledge, intent or lack of mistake.

Second, the evidence was relevant. Evidence is relevant if it tends to make a fact of consequence to the action more or less probable than it would be in the absence of such evidence. MRE 401. Evidence of defendant's prior convictions tended to refute defendant's claim that he did not know what a bindle of heroin was. During defendant's case, he denied that there was heroin in the car, and testified that he did not know where the heroin came from and that he felt that the police officers were "setting him up." Defendant also testified that he exclusively used and sold cocaine for an 11-year period, but that he had stopped in 1995, and that if the police had recovered cocaine from the Toyota, it would be "something different." The jury could draw the permissible inference that a person with 11 years of experience selling cocaine would be more likely to know what heroin looks like, how heroin is commonly packaged, and how to acquire heroin. These inferences would allow the jury to conclude that it was more likely than not that defendant knew about the heroin on the seat in the car.

Third, the probative value of the prior convictions is not substantially outweighed by the danger of unfair prejudice under MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. Evidence of defendant's prior drug convictions is not so inflammatory that the jury would give it preemptive or undue weight. Further, the probative value of the prior convictions was substantial in light of defendant's denial that he knew what the heroin was or how it was packaged. Moreover, the determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is "best left to a contemporaneous

assessment of the presentation, credibility and effect of the testimony." *VanderVliet*, *supra* at 81. Therefore, we defer to the trial court's MRE 403 determination.

Finally, the trial court issued a limiting instruction that "[a] past conviction is not evidence that the defendant committed the alleged crime in this case." Although this was not the correct instruction to use with MRE 404(b), it adequately informed the jury that the prior drug convictions could only be used for a limited purpose. A limiting instruction can protect a defendant's right to a fair trial because jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Therefore, we conclude that the trial court did not abuse its discretion in admitting evidence of defendant's prior drug convictions.

Defendant next raises four allegations of prosecutorial misconduct. We conclude that defendant has failed to show that he was denied a fair trial by the prosecutor's actions.

"We review de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *Id*. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id*. at 448-449. Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant first argues that the prosecutor engaged in misconduct during voir dire by personally vouching for the case and by placing the prestige of his office behind the case. We disagree. A review of the prosecutor's entire statement during voir dire reveals that he was permissibly commenting on the evidence he expected to offer at trial. The prosecutor's statement also pointed out issues that might arise during the presentation of his case and noted that the evidence at trial would not answer all of the questions a prospective jury member may have, such as the origins of the $167,200. Because a prosecutor may properly comment on the evidence consistent with his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), we conclude that defendant has failed to establish plain error.

Defendant next argues that the prosecutor engaged in misconduct by improperly stating his personal opinion during voir dire and opening statements that Kathy would fabricate her testimony to protect defendant. Again, we disagree. Examining the prosecutor's comments in context, we find that the prosecutor was commenting on whether the jury should credit Kathy's proposed testimony in light of her continued relationship with defendant. A prosecutor may argue from the facts that a witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Accordingly, defendant has failed to establish plain error.

Defendant next argues that reversal is required because the prosecutor told the jury that defendant should be convicted out of sympathy for Kathy. We disagree once again. This Court will not reverse where the prosecutor's conduct is isolated and where the appeal to jury sympathy is not blatant or inflammatory. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Here, the complained of remark was brief and was made near the middle of the

prosecutor's closing argument. Further, viewing the entire closing argument, the remark was not so inflammatory as to deny defendant a fair trial. Moreover, any prejudice the remark caused could have been alleviated by a timely objection and a curative instruction. *Ackerman, supra* at 449. Accordingly, we conclude that defendant's argument is without merit.

In defendant's sole preserved argument regarding the prosecutor's alleged misconduct, defendant contends that the prosecutor engaged in misconduct by eliciting testimony from him regarding his opinion of Connor's credibility. "It is not proper 'for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative and credibility determinations are to be made by the trier of fact.'" *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001) (citations omitted). Although we find the prosecution's examination of defendant was improper, under the circumstances, we conclude that reversal is not warranted. During defendant's direct examination, he testified that the first time he saw the heroin was in Connor's police car when Connor showed him the bindle of heroin and the lottery ticket strips. Although improper, the prosecution's questions were responsive to defendant's antecedent denial of knowledge of the items the police found in his car. Moreover, any potential prejudice could have been remedied by a timely objection and a curative instruction. *Id.* at 385. Further, the trial court instructed the jury that it alone determined the credibility of the witnesses; juries are presumed to follow their instructions. *Graves, supra* at 486. Accordingly, we conclude that defendant was not denied a fair trial by the prosecutor's examination. *Thomas, supra* at 454.

Defendant next argues that he was denied the effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different." *Knapp, supra* at 385. A defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Id*. at 385-386.

Defendant first argues that defense counsel's performance was objectively unreasonable because he failed to procure a transcript of the evidentiary hearing before trial. We disagree.

Defendant has failed to show that a reasonable probability existed that the outcome of the trial would have been different had defense counsel obtained a copy of the suppression hearing transcript. A comparison of Connor's and Kathy's testimony at trial and the evidentiary hearing reveals that their respective testimony is similar. Defendant has not shown with what testimony defense counsel would have impeached Connor or Kathy had defense counsel procured a transcript of the suppression hearing. Additionally, the record reveals that counsel effectively cross-examined both Connor and Kathy at trial. Accordingly, we conclude that defendant's ineffective assistance of counsel claim on this basis is without merit.

Defendant next argues that counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct discussed *supra*. We disagree.

The bulk of the prosecutor's comments were proper, so defense counsel was not ineffective for failing making a futile objections. *Thomas, supra* at 457. Moreover, the instances of the prosecutor's misconduct were effectively cured by the trial court's jury instructions. *Id*. Consequently, counsel's failure to object to the prosecutor's improper statements was not serious

error but for which there is a reasonable probability that defendant would have been acquitted. *Knapp, supra* at 385.

Defendant finally argues that he was denied the effective assistance of counsel because defense counsel failed to request the similar acts jury instruction. We disagree.

Although the record reveals that defense counsel did not request CJI2d 4.11, defendant has not overcome the presumption that counsel's failure to request the cautionary instruction was a matter of trial strategy. *Ackerman, supra* at 455. Defense counsel may have determined that any instruction would have highlighted defendant's prior drug convictions. Indeed, defense counsel may have chosen not to draw unnecessary attention to this evidence. Moreover, defendant's brief on appeal contains a conclusory argument that he would have benefited from the instruction. Because he does not argue or offer support for his position that but for counsel's failure to request the instructions the outcome of trial would have been different, we conclude that defendant's final claim of ineffective assistance of counsel must fail. *Knapp, supra* at 385.

Defendant finally argues that the cumulative effect of the alleged errors denied him a fair trial. "The cumulative effect of several minor errors may warrant reversal where the individual errors would not." *Ackerman, supra* at 454. Here, we have identified two instances where the prosecutor's conduct was improper, but neither individually nor collectively were these instances so seriously prejudicial as to deprive defendant of a fair trial. *Knapp, supra* at 388. Thus, the cumulative effect of errors in the instant case do not warrant a new trial. *Id*.

We affirm.

/s/ Michael J. Cavanagh
/s/ Jane E. Markey
/s/ Patrick M. Meter